

HOWARD G. BOOTH
RED ROCK AUDUBON SOCIETY

IBLA 93-612, 93-613

Decided January 18, 1996

Appeals from a Decision Record and Finding of No Significant Impact approved by the Las Vegas District Manager, Bureau of Land Management, authorizing a water development for desert bighorn sheep within the Muddy Mountains Wilderness Study Area. EA NV-054-93-049.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness-
-Wilderness Act

The approval of a water development for desert bighorn sheep within a wilderness study area will be affirmed where the record establishes that installation of the project is consistent with BLM's Interim Management Policy and Guidelines for Lands Under Wilderness Review, and the record shows that the project will not impair the area's suitability for inclusion in the permanent wilderness system.

2. Environmental Quality: Environmental Statements—Wilderness Act—Federal Land Policy and Management Act of 1976: Wilderness

In determining that a proposed slickrock water catchment structure in a WSA would not impair the suitability of the area for preservation as wilderness, BLM was required to make subjective judgment decisions. Those decisions are entitled to considerable deference, even though reasonable men might differ in making such assessments. When BLM's subjective decisions are challenged on appeal, there must be a showing of a clear error of law or demonstrable error of fact.

APPEARANCES: Howard G. Booth, Boulder City, Nevada, pro se; John E. Hiatt, Conservation Chairman, Las Vegas, Nevada, Red Rock Audubon Society;
Derril W. Wenzel, President, Fraternity of the Desert Bighorn, Las Vegas, Nevada.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Howard G. Booth and Red Rock Audubon Society (RRAS) have filed separate appeals from a July 8, 1993, Decision Record and Finding of No Significant Impact (DR/FONSI), approved by the Las Vegas District Manager, Las Vegas, Nevada, Bureau of Land Management (BLM), authorizing the Fraternity of the Desert Bighorn (the Fraternity) to construct a slickrock-type water development for desert bighorn sheep, at a site known as Muddy #5 or Safari Club Water Development, in the NW¹/₄ of sec. 25, T. 19 S., R. 65 E., Mt. Diablo Meridian, within the Muddy Mountains Wilderness Study Area (WSA). 1/

In Environmental Assessment (EA) NV-O54-9-25, entitled "Bighorn Sheep Water Development in the Muddy Mountains," BLM analyzed the potential impacts of constructing water catchments within the Muddy Mountains WSA. In a DR/FONSI, dated February 1, 1989, which was based on that EA, BLM authorized the construction of a slickrock type desert bighorn sheep water development in the WSA. BLM stated therein that subsequently another such project would be undertaken and that a supplemental EA would be required. The DR/FONSI under review in this appeal is based on that supplemental EA, NV-045-93-049. 2/

In that DR/FONSI, BLM explained that the purpose of constructing water catchments was to replace historical waters which are degraded, or no longer available, and to improve habitat for desert bighorn sheep where there is the most potential for long-term management. The purpose of this second catchment was to provide a second water source on Muddy Peak in case the first project failed. BLM noted that under the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), water catchments may be built in WSA's "if they enhance wilderness values, are

1/ In a Sept. 21, 1993, order, the Board noted that the procedural regulations at 43 CFR 4.410(a) require that one must be both a party to a case and be adversely affected by a BLM decision in order to maintain an appeal. In that order, we found that Booth was a party to the case, but that the record failed to show that he was adversely affected by BLM's decision. Thus, we ordered him to show cause why his appeal should not be dismissed for lack of standing to appeal. By response dated Oct. 19, 1993, Booth indicated that he uses the lands in question for backpacking, climbing, and hiking. Use of the lands in question provides a sufficient interest to confer standing to appeal. Sharon Long, 83 IBLA 304, 307-08 (1984).

2/ The supplemental EA and the DR/FONSI were prepared by the Stateline Resource Area and the Stateline Resource Area Manager signed the DR/FONSI as recommended action on July 7, 1993. On July 8, 1993, the District Manager approved that recommendation. In a cover letter dated July 9, 1993, addressed to concerned citizens, the District Manager informed the public of the DR/FONSI and explained the right to appeal it.

substantially unnoticeable in the area as a whole and do not require maintenance involving motor vehicles" ^{3/} (DR/FONSI at 18-19). BLM found that the proposed catchment would not significantly affect opportunities for primitive recreation and solitude in the WSA.

In that DR/FONSI, BLM selected alternative 2 of the EA for the location of the water development project. As described in the EA, alternative 2 would utilize a natural rock surface for water collection with a small concrete and rock dam constructed at its base. Water would be carried to two or three 2,300-gallon storage tanks by pipelines. Pipelines would be buried, covered with rocks, or painted to blend into the environment.

On appeal, Booth acknowledges that BLM's IMP permits permanent installations in WSA's if there is an enhancement of wilderness values, but he asserts that none of the alternatives described in the EA concludes that the catchment basin would, in fact, enhance wilderness values. The project, Booth states, is at odds with the IMP, according to which enhancement of wilderness values means the development of a natural distribution, number and interaction of indigenous species, in a natural balance with each other. Increasing the water supply, Booth argues, manipulates the natural numbers of the species. Booth argues that restoring original, natural sources of water should be the preferred method of achieving natural numbers and distributions of desert bighorn sheep. Also, Booth asserts that the EA is confusing in that it fails accurately to match the sites described in the alternatives with locations on maps.

RRAS asserts that as a permanent man-made structure, the catchment is inconsistent with the Wilderness Act of 1964, 16 U.S.C. § 1131 (1994). RRAS contends that if habitat enhancement were a policy goal in wilderness areas, various things, such as forage improvement, generation of increased cover, or modification of water sources, could be done to enhance habitat. However, RRAS contends that desert bighorn sheep are neither rare nor endangered in the Muddy Mountains WSA and have existed for thousands of years in the area without artificially provided water to sustain them. RRAS suggests that it may be better to have a smaller herd of desert bighorn sheep, rather than a larger one dependent on man. RRAS suggests that as an alternative to a second catchment, a natural spring located outside the WSA could be restored and made available to wildlife, including desert bighorn sheep. RRAS fails to see the need for yet another catchment basin considering the fact that there are already several existing catchments in the general vicinity outside the WSA.

^{3/} The IMP was originally published at 44 FR 72014 (Dec. 12, 1979) and was thereafter amended at 48 FR 31854 (July 12, 1983). The IMP was subsequently incorporated in the BLM Manual (H-8550-1).

The Fraternity answers that there is no prohibition on the construction of water developments within the WSA, and that survival of the desert bighorn sheep depends on sound management practices and not natural conditions. The Fraternity asserts that significant populations exist because of sound management practices. The Fraternity states that the EA correctly evaluated the available options, and that BLM properly authorized the catchment project.

[1] The standard for managing a WSA during wilderness review is found in section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988). The Secretary is expressly directed to "manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c) (1988). See generally Ralph E. Pray, 105 IBLA 44, 46 (1988); California Wilderness Coalition, 101 IBLA 18, 25 (1988). "Impairment of suitability for inclusion in the Wilderness System" is defined as causing such impacts "that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole" by the time the Secretary is scheduled to make his recommendation as to the area's suitability for wilderness. 43 CFR 3802.0-5(d).

In furtherance of this directive, the Department adopted the IMP which governs BLM's management of WSA's pending ultimate congressional determination regarding whether the study areas should be included in the permanent wilderness system. See Oregon Natural Resources Council, 114 IBLA 163, 167 (1990); The Wilderness Society, 106 IBLA 46, 55 (1988); L. C. Artman, 98 IBLA 164, 168 (1987).

The IMP guidelines relevant to this appeal are as follows:

Certain permanent installations may be permitted to maintain or improve conditions for wildlife and fish, if the benefitting species enhance wilderness values. Enhancing wilderness values means that a natural distribution, number, and interaction of indigenous species will be sought; natural processes will be allowed to occur as much as possible, and wildlife species should be allowed to maintain a natural balance with their habitat and with each other. Installations to protect sources of water on which native wildlife depend, such as e[n]closures, may be built for permanent use if they are substantially unnoticeable in the area as a whole and blend into the natural setting. Springs, wells, and guzzlers may be maintained, and new ones may be installed if they are substantially unnoticeable in the area as a whole and would not require maintenance involving motor vehicles if the area were designated as wilderness.

(BLM Manual, H-8550-1, at 41).

The supplemental EA (NV-054-93-049) states that the water catchment at issue here, the second such facility within the Muddy Mountains WSA, was proposed as a result of an ongoing cooperative effort between BLM and the Nevada Department of Wildlife (NDOW) "to enhance bighorn sheep distribution and habitat on Public lands within the Las Vegas District and Muddy Mountains in particular" (EA at 2). BLM stated that the rationale supporting a second catchment was to provide a second source of water in event the first catchment ran dry or failed. Also, it stated that a second catchment would reduce the concentration of animals in one area of Muddy Peak during the summer, which in turn "would reduce the potential for over-utilization of forage and disease transmission" (EA at 2).

BLM's goal with respect to the desert bighorn population is to manage it at the carrying capacity of the habitat and to adjust population size based upon the results of monitoring. If monitoring indicates over-utilization of forage, NDOW would reduce desert bighorn numbers through "appropriate management actions" (EA at 16). The DR/FONSI contains the following discussion pertaining to desert bighorn population size:

The natural number and distribution of bighorn sheep within the WSA before the arrival of European man is unknown. Current numbers may be either higher or lower than historical numbers. Current distribution may be either similar or substantially different than historical distribution. "Natural" distribution of bighorn sheep in the Muddy Mountains WSA has already been greatly affected by the construction of Hoover Dam, the presence of Las Vegas, the introduction of horses and burros, increasing recreational use of the area and mining. Based upon current presence of bighorn sheep in the Muddy Mountain WSA (without reintroduction or augmentation releases) and archeological evidence it is highly probable that the WSA historically supported a resident population of bighorn sheep. Since the bighorn is indigenous to the WSA and southern Nevada, and currently occupies the area under consideration, construction of the proposed project is not expected to greatly change the interaction of indigenous species in the WSA.

(DR/FONSI at 19).

Booth acknowledges that under the IMP guideline quoted above, water catchment structures are permitted within a WSA. However, they are required to enhance wilderness values, meaning that a natural distribution, number, and interaction of indigenous species must be sought. Booth asserts that BLM's stated goal, to manage desert bighorn at "carrying capacity," is a manipulation of their numbers. While it is reasonable to conclude that an additional source of water might allow more animals to survive a drought, such a "manipulation" is permitted by the IMP and is not inconsistent with it. Nor is such a water catchment facility contrary to

the Wilderness Act, 16 U.S.C. § 1131(c) (1994), which recognizes that some human intrusion is necessary in that a wilderness is to be "protected and managed so as to preserve its natural conditions." (Emphasis added.)

[2] BLM was required to make subjective judgment decisions when assessing whether the proposed action would impair the suitability of the area for preservation as wilderness. Those subjective judgment decisions are entitled to considerable deference, even though reasonable men might differ in making such assessments. When BLM's subjective decisions are challenged on appeal, they may not be overcome by mere expressions of disagreement. There must be a showing of clear error of law or demonstrable error of fact. Committee For Idaho's High Desert, 130 IBLA 327, 332 (1994); Utah Wilderness Association, 86 IBLA 89, 90-91 (1985). Appellants have failed to establish that approval of the water catchment structure was contrary to the relevant statutes and policy guidelines or that it was based on a factual error. Appellants' difference of opinion does not demonstrate that BLM's analysis is unreasonable or invalid. Powder River Resource Council, 124 IBLA 83, 91 (1992); Southwest Resource Council, Inc., 73 IBLA 39, 42 (1983).

With respect to the location of the approved catchment site, the EA is not a model of clarity. As to the selected alternative, the EA states that the "second water development [would be] at Site #10 (See Map 1) or within one mile thereof" (EA at 1). Appended to the EA are four maps only two of which are numbered, Map 3 and Map 4. The first unnumbered map is a map of the southern half of the State of Nevada described as "General Location Map Muddy Mountain #5 Water Development." The second unnumbered map bears the designation "Existing Situation." It has a legend designating numbers and stars for "Project location and number." The map shows various numbers: 1, 2, 3, 4, 5A, 5B, 5C, and 10, located adjacent to stars. Map 3, which is a photocopy of part of a larger map without any designation for township, range, or sections, shows a circle with an "x" in the center in the NW¹/₄ of one of the sections and the designation "Proposed Site." Map 4 merely shows how the water development project would be constructed. A reference in the EA text, placing the location at "one of two alternative sites shown on Map #2" (EA at 3), further confuses the issue. The DR/FONSI on page 1 provides the legal description for the site and states "(See maps 3 and 4)."

In its response to Booth, the Fraternity states "[w]e concur with Mr. Booth's comments that the maps and site descriptions are confusing. We did not notice the problem because of our familiarity with the sites. The correct site is 5B on the unnumbered map (Existing situation)" (Response at 5).

If the site is as described by the Fraternity, it does not appear to be in the location of the legal description in the DR/FONSI. Nevertheless, while BLM clearly could have done a better job of precisely designating the location of the project, Booth does not indicate that he is prejudiced or otherwise adversely affected by the lack of specificity as to location.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

James L. Bymes
Chief Administrative Judge

